United States Court of Appeals
For the Ninth Circuit

No. 14805

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellant,*
vs.
JOSEPH A. SICILIANO, *Appellee.*

JOSEPH A. SICILIANO, *Appellant,*
vs.
AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF GUAM

BRIEF OF CROSS-APPELLEE AMERICAN PACIFIC DAIRY PRODUCTS, INC. IN RESPONSE TO OPENING BRIEF OF JOSEPH A. SICILIANO, CROSS-APPELLANT

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COMMENT ON STATEMENT OF FACTS

The original defendant and cross-appellee, American Pacific Dairy Products, Inc., in Cause No. 14805, has already filed an opening brief as appellant and will not repeat a Statement of the Case in this appellee brief. Reference is hereby made to the Statement of the Case in defendant-appellant's opening brief, starting at page 4.

The function of this comment is to point out that defendant American Pacific Dairy Products, Inc., has been unable to establish from the Record certain of the facts set forth in the Statement of the Case contained in

the opening brief of plaintiff and cross-appellant Joseph A. Siciliano.

First, it is stated that the cross-appellant Siciliano (hereinafter referred to as the plaintiff) transferred trained personnel from his own corporation to the partnership business for use on partnership business at no expense to the partnership. It is then stated that plaintiff left the operation of the ice cream store in charge of his corporate management and that plaintiff "directed his affairs in the territory through the management personnel of his corporation by correspondence and telephone calls with his personnel" (Pl. Br. 4 and 5). The plaintiff Siciliano then concludes that plaintiff thus provided, at his own expense, trained supervision of the partnership business during all times that the same was under his control (Pl. Br. 5). The record discloses that plaintiff Siciliano billed the partnership on behalf of his corporation, Pacific Enterprises, Inc., for the salaries of all personnel, including any management people (R. 14806, Page 8 at XIII). This item was not allowed by the trial court, not because it wasn't demanded, but because there was no evidence to support it (R. 14806, Pages 70-71 and 231). The management personnel referred to in the Record are Mr. Ernesto O. Diza and Joseph Meggo. It is undisputed that Mr. Edward Thompson demanded and received reports from Mr. Diza (R. 14805, Pages 280-281), and that Mr. Thompson would send invoices for supplies, checks for payments of expenses, and letters on operation to this employee (R. 14805, Pages 171, 295, 297, 298). It is also undisputed from the testimony

of the individuals themselves that Diza did not make any reports to Siciliano or receive any instructions from him (R. 14805, Pages 294). The employee Meggo, in charge of the other employees, did not ever make a written report to the appellee or receive any written instructions from him, and during the two-year absence of the plaintiff, Siciliano only talked to him on the telephone twice (R. 14805, Page 179).

Cross-appellant Siciliano states that the amounts mentioned in the reports of Diza were accepted as correct by the president of defendant American Pacific Dairy Products, Inc. (Pl. Br., Page 5). The Record establishes that Mr. Thompson, the president of the appellant, received these reports but he could not testify as to their accuracy (R. 14805, page 222).

Cross-appellant Siciliano states that there was no explanation as to why the corporate books were changed to reflect the periods September 1, 1952 to July 1, 1953, instead of to reflect cumulative sales and profits from the beginning of operation of the business (Pl .Br. page 7). The Record reflects that the reason for this change was to place the books of the Dairy Queen on the fiscal year basis of defendant American Pacific Dairy Products, Inc., which was September 1, to August 31 (R. 14805, page 224-232).

Cross-appellant Siciliano states that profits and funds of the partnership business were used by the defendant for the benefit of a competing corporation known as Guam Frozen Products, Inc. (Pl. Br., page 7-8). It is true that funds of American Pacific Dairy Products, Inc., were used in establishing Guam Frozen

Products, Inc., but this was done after the dissolution and termination of the purported partnership and the Record does not reflect that any of the funds of Siciliano were used for this purpose (R. 14805, page 239-242).

For a statement of the defendant cross-appellee's, position regarding all the facts of this case reference is again made to the Statement of the Case of defendant, American Pacific Dairy Products, Inc., contained in the brief of appellant, American Pacific Dairy Products, Inc., starting at pages 4 and 5.

ARGUMENT AND AUTHORITIES

I.

The Lower Court Properly Held That the Partnership Agreement Required the Plaintiff to be Physically Present on Guam and That the Plaintiff Was Not An Innocent Party But Rather Caused the Dissolution of the Partnership, and These Findings of Fact of the Lower Court Should Not Be Set Aside.

The Findings of Fact of the Lower Court should not be set aside unless clearly erroneous. Federal Rules of Procedure, 52(a). For many cases establishing this proposition reference is made to the annotation in F.R.C.P. 52(a) Title 28 U.S.C.A. See particularly notes 38 and 43.

In Case No. 14805, the appellant cross-appellee American Pacific Dairy Products, Inc., the defendant in the court below, (hereinafter referred to as the defendant), does not challenge the Findings of Fact of the Lower Court except as to the court's finding that there

was a formal partnership, if, in fact, the Lower Court actually found there was a formal partnership. The defendant is of the opinion that the Lower Court did not ever make such a finding. See (Brief of appellant, American Pacific Dairy Products, Inc., pages 29-31) and the court's findings (R. 14805, pages 103 and 114).

The cross-appellant and appellee, Joseph A. Siciliano, the plaintiff the court below (hereinafter referred to as the plaintiff) in his opening brief starting at page 9, lists the specifications of error on which he relies. An examination of the seven specifications of error set forth and the arguments which attempt to establish these specifications indicates Specifications I, II and VII require that the Findings of Fact of the lower court be found to be erroneous as not being supported by the evidence.

In Specification of Error No. I and the argument thereunder, plaintiff argues that Sections 7, 8 and 13 of the purported partnership agreement (R. 14805, pages 9-13) did not create a contractual duty on the part of the plaintiff to assume managership of the ice cream business (Pl. Br. page 12). The trial court found that as a matter of fact that when these agreements were entered into the defendant needed the plaintiff to manage its store and in turn plaintiff was given the opportunity to invest in what proved to be a very profitable business (Record 14805, pages 98-99). Again it was further stated by the lower court:

> "The plaintiff contends that the partnership agreement did not require him to act as manager but merely provided for his compensation while employed as manager. While it is true that the

agreement could be more explicit, no provision is made in the agreement for any other manager or for selecting any other manager. The plaintiff was in Guam; Thompson was to be in Seattle, Washington. The entire agreement contemplated that the defendant relied upon the plaintiff to provide his services and initiative in carrying on the business. This is further evidenced in Paragraph 13(a) of the agreement, which provides that the salary of the plaintiff shall cease at the time of his death. It is inconceivable that if plaintiff was not obligated to manage the business that no provision would have been made for the appointment of another manager." (Record 14805, pages 102-103)

This finding of the lower court is amply supported by the evidence. For example, Mr. Edward Thompson, president of defendant, testified under questioning of the plaintiff's attorneys that he believed Mr. Siciliano was "one of the ablest men I know" (Record 14805, page 252). Mr. Siciliano, the plaintiff, testified that he was to be manager (Record 14805, page 148). Mr. Edward Thompson, president of American Pacific Dairy Products, Inc., testified that when he arrived in Guam he discovered that Mr. Slaughter, the corporate manager on Guam, was leaving for Ethiopia and that at this time he knew it was absolutely necessary to the business to have another manager (Record 14805, pages 318-320). The defendant, American Pacific Dairy Products, Inc., submits that the finding of the court that the plaintiff Siciliano was to manage the business is amply supported by the evidence.

In Specification of Error No. II, plaintiff Siciliano states: "The lower court erred in failing to hold that

the defendant breached the partnership agreement as of July 1, 1953, when it excluded plaintiff from participation in the partnership business and took unto itself all of the partnership profits and assets."

It is a mixed question of fact and conclusion of law whether defendant or plaintiff breached the partnership agreement. It is undisputed from the record that plaintiff Siciliano left the island of Guam nine days after the agreements were signed and remained away from the island of Guam for a period in excess of two years (Record 14805, pages 99-101, 148-149, 328). The defendent American Pacific Dairy Products, Inc., submits that the admitted fact of plaintiff Siciliano's leaving the island of Guam after promising to act as manager of the proposed business amply supports as a matter of fact the lower court's conclusion that the plaintiff breached the agreement and not the defendant.

No. VII of the plaintiff's Specifications of Error states that the lower court erred in failing to give the plaintiff the value of the good will of the partnership business and argues this on the basis that the plaintiff was an innocent party to the dissolution. The innocence of the plaintiff again is a question of fact which the trial court decided against the plaintiff when the court decided that plaintiff breached the agreement by his failure to remain on Guam (Record 14805, pages 102-103). The cross-appellee American Pacific Dairy Products, Inc., submits that this finding of the court is amply supported by the record and should not be set aside (R. 14805, pages 148-149, 328). Therefore, since plaintiff Siciliano is not an innocent party to the dissolution,

he is not entitled to the value of the good will of the partnership business upon dissolution. Guam Civil Code, Section 2432.

II.

The Plaintiff Siciliano Breached the Conditions of His Offer Which Was Never Accepted by the Appellant American Pacific Dairy Products, Inc.

The defendant American Pacific Dairy Products, Inc., as pointed out in its opening appellant brief, maintains there was no partnership between the parties, since the proposed agreement was never ratified by the appellant corporation. The appellant corporation has been willing to recognize any liability which might be imposed upon it due to the reliance of plaintiff Siciliano upon the actions of its president or the actions of the corporation in not immediately appointing a new manager for its business upon Guam and, therefore, concedes there may have been a defacto partnership during some of the 10 months prior to defendant establishing its new manager. The difficulties involved in this law suit would never have arisen if plaintiff Siciliano had remained upon Guam and carried out his promises. The refusal of the Board of Directors of defendant to ratify the proposed agreement was based upon the fact that Mr. Siciliano's status on Guam had changed from the time of the proposed agreement, and, therefore, the corporation would not be obtaining what its president, Edward Thompson, had bargained for in attempting to establish a partnership with the plaintiff Siciliano. The lower court, after hearing all the witnesses and exam-

ining all of the exhibits sums up the situation as follows:

> "As of the time these agreements were entered into the situation was perfectly clear. The defendant needed the plaintiff to manage its store in which it had invested nearly all of its corporate capital. In turn, the defendant was given the opportunity to invest in what proved to be a very profitable business. For his $15,000 and an additional $4,000 to be paid out of profits he received a 50 per cent interest in a now (sic new) and challenging business enterprise along the lines of his business experience and aptitude." (R. 14805, 98-99)

and

> "The plaintiff, having breached his agreement, forced the defendant to protect itself by taking over the partnership assets. Prior to this step the defendant made every reasonable effort to induce the plaintiff to comply and to leave the door open for his return." (R. 14805, page 108)

If this court accepts appellant American Pacific Dairy Products, Inc.'s, argument that there was no contract of partnership but rather an informal agreement which can be construed to be a *de facto* partnership starting June 23, 1952, to prevent injustice, then there is no doubt that the plaintiff breached the terms of this *de facto* agreement by leaving Guam on July 1, 1952. It follows that defendant American Pacific Dairy Products, Inc., was justified in refusing to go forward with plaintiff Siciliano in the business venture, and was justified on April 23, 1953, completely terminating the arrangement by tendering to plaintiff Siciliano the $15,000 he had contributed to the business and having its own manager

take over operation of the business (Defendant's Exh. F, R. 344; R. 59-67, Exh. E attached to the answer) (R. 14805, pages 269-270, 385). The plaintiff Siciliano himself, in his brief, page 12, indicates that no agreement was reached on the point of the amount of time plaintiff was to spend in managing the partnership business, and, therefore, seems to also be arguing there was no agreement between the parties.

The plaintiff Siciliano argues that this is not the type of business which requires a manager or that customarily precludes delegation of performance to agents and employees. Plaintiff cites Restatement, Law of Contracts, Section 160(3) and Section 160(2). Both of these sections clearly set forth that performance or offer of performance by a person delegated is not acceptable if:

> "Performance by the person delegated varies or would vary materially from performance by the person named in the contract as the one to perform, and there has been no such assent to the delegation as stated in Section 162 * * * " (Restatement, Law of Contracts Sec. 160)

The Record amply supports the necessity for the defendant (which is a Washington corporation with its officers and directors in Seattle), having a responsible manager on Guam to take care of its business. The Lower Court found as a matter of fact that the employees of Pacific Enterprises, Inc. were not properly operating the business and that delegation to them was certainly not proper. For a listing of the improper conditions which existed at the store prior to the arrival of defendant's full time manager in April, 1953, see

the Court's summary in its opinion (R. 14805, pages 101-102).

The plaintiff Siciliano argues that the functions, duties, rights and liabilities of partners in a great measure comprehend those of agents. An examination of the cases cited by the plaintiff indicates that these cases refer to the relationship of the partners toward third parties and the liability of one partner toward a third party caused by the action of another partner. These cases certainly do not stand for the proposition that one partner may delegate the management of the business to a series of sub-employees without even providing a general agent to manage such employees. The plaintiff cites as authority for the proposition that a manager or partner has the power to appoint third persons as agents or employees to conduct partnership business the case of *State Compensation Insurance Fund v. Industrial Insurance Commission* (1933) 28 Cal.App.2d 474, 82 P.2d 732.

This case does not hold that the manager of a business may delegate all managerial responsibility to the employees of the business. In this case it was a matter of determining whether a partner had hired a chauffeur and was on partnership business at the time when an accident occurred injuring the chauffeur. The defendant American Pacific Dairy Products, Inc. has paid the salaries of the employees hired by Joseph Siciliano while he was acting as a purported agent of American Pacific Dairy Products, Inc., and, therefore, the question of whether the employees can collect from the defendant or its insurers is not at issue.

III.

Even If There Was a Partnership Agreement the Defendant Did Not Cause a Breach by Its Action of Excluding the Defendant in April, 1953, or Investing in Another Store in November, 1953.

The plaintiff Siciliano, in his argument that defendant breached the agreement (Pl. Br. section II P. 19-23) confuses the Lower Court's findings as to point of time when defendant finally wound up the business with the time of the breach of the agreement caused by Plaintiff Siciliano leaving the Island of Guam. The Lower Court found that the plaintiff reached San Francisco in July, 1952, and that he was gone from Guam for a period of two years and that Thompson (president of appellant) made every reasonable effort to induce the plaintiff to return, and that no action was taken to "liquidate the partnership until many months after the situation was known to exist" (R. 14805, page 100). The Court found that the defendant abandoned its efforts to get the plaintiff to return and took exclusive control of the partnership business on July 1, 1953 (R. 14805, p. 102). At this point liquidation has occurred. The evidence is undisputed that the defendant American Pacific Dairy Products, Inc. did not invest in Guam Frozen Products, Inc. until November, 1953, which was *five months after the liquidation* of the partnership business (R. 14805, p. 239). These findings establish that there was no partnership to be dissolved in November, 1953 when defendant invested in Guam Frozen Products.

It would seem to be elementary under the partner-

ship statutes that a partner cannot substitute another for himself in the business without causing a dissolution of the partnership. Guam Civil Code Section 2423.

The defendant American Pacific Dairy Products, Inc. certainly did not acquiesce or accept this delegation of authority as is shown by the resolutions sent to Mr. Siciliano (R. 14805, Ex. E attached to Answer page 59-67), and findings of the trial court (R. 14805, pages 100-101 and 108). As is pointed out in the appellant's opening brief, the Board of Directors of the appellant offered Mr. Siciliano every chance to return to the Island of Guam, and at no time acquiesced in any delegation of authority to the employees of Mr. Siciliano (R. 14805, page 108) (Appellant American Pacific Dairy Products, Inc. Brief, pages 33-34).

Even if these was not an automatic dissolution on July 1, 1952, when plaintiff left the Island of Guam, defendant certainly had the right to terminate the management by notice on April 21, 1953. In this connection reference is made to the case of *Zeibak v. Nasser,* 12 Cal.2d 1, 82 P.2d 375. The *Zeibak* case is cited by the plaintiff in seven separate places and was quoted by the Lower Court in its memorandum opinion. In the *Zeibak* case the plaintiff Zeibak sued for a dissolution of an informal joint venture with the Nasser brothers who were operating a series of theaters in California. The Nasser brothers (the defendants) were to manage certain theaters for Zeibak and the Nassens but the parties had a falling out because plaintiff Zeibak wanted to manage the theaters. Also Zeibak refused to enter into a corporation with the

Nasser brothers as had been agreed to at the start of the venture. The Nasser brothers tried to get the plaintiff Zeibak to perform and finally excluded him from the busines. The trial court found that the *plaintiff Zeibak wrongfully caused the dissolution by refusing to carry out his original agreement* and that the defendants Nasser were justified in finally excluding Zeibak from the joint venture. The Appellate Court upheld the finding and the judgment of the Lower Court and stated that the defendants were justified in excluding the plaintiff Zeibak from the business. The Appellate Court also found that the Nassers had a going business before they discussed a joint venture with the plaintiff Zeibak and that there was no formal partnership agreement because the defendants Nasser could not get the plaintiff Zeibak to comply with the original conditions.

This case is remarkably similar to the case at bar and the defendant American Pacific Dairy Products, Inc. is willing to submit the case to this court on the basis of the *Zeibak* case. As in the *Zeibak* case, the defendant American Pacific Dairy Products, Inc. had a going business before Siciliano came in, was unable to reach a final agreement with the plaintiff Siciliano regarding the business because he would not or could not carry out the terms of the original agreement and after much discussion was finally required to exclude him from the business. The *Zeibak* case completely supports the position taken by defendants in the case at bar and supports the trial court's decision that dissolution should have been decreed because of the plaintiff Sici-

liano's refusal to carry out the terms of the original proposals even though a formal agreement was never finally ratified.

The cross-appellee American Pacific Dairy Products, Inc., does not question the fact that a partner is accountable as a fiduciary during such period as a partnership exists. At such time, however, as the partnership has been dissolved and terminated by a tender to the plaintiff of his interest in the business, there was no longer a partnership, and unless it can be shown that the accounting partner has improperly used the funds of the retiring or abandoning partner, there is no evidence that any fiduciary duty or relationship has been breached. There is no evidence in the record that cross-appellee American Pacific Dairy Products, Inc. ever used any of the funds of plaintiff Siciliano or any purported profits arising therefrom to which plaintiff Siciliano was entitled.

The plaintiff cites the case of *Lanpher v. Warshauer* (1915) 28 Cal. App. 457, 152 Pac. 933, as authority for the proposition that plaintiff's actions in the case at bar cannot in fact or in law be construed as an intent to abandon or relinquish the business in favor of the defendant. The *Lanpher* case, *supra,* is not at all analogous to the case at bar since in that case the plaintiff agreed to build and construct buildings using defendant's capital and defendant's land with both parties to share in the profits of any future sale of the property. The plaintiff did not finish building the house but did complete part of it, and then the defendant moved in, declared a homestead on the property and refused to

account to the plaintiff. The appellant court properly held that the plaintiff had a right to an accounting but did not hold that the plaintiff had a right to consider there was still a partnership in existence. In the case at bar the plaintiff Siciliano confuses the court's conclusion that plaintiff acquiesced in the exclusion *at the time of the offered return of his investment* with a situation where a mere abandonment took place with no offer to repay the party for his investment. The Trial Court properly held (Record 14805, page 113):

> "2. The partnership of the parties was dissolved by exclusion of the plaintiff because of his breach and acquiescence in such exclusion as of July 1, 1953."

This was an acquiescence in the termination and dissolution by the plaintiff Siciliano by his not objecting to his complete removal from the business and the settlement offered by the defendant American Pacific Dairy Products, Inc. As pointed out in the brief of appellant American Pacific Dairy Products, Inc. at pages 46 and 47, when one partner states to the other that there has been a termination abandonment or breach of the agreement and makes an offer in termination, the other party cannot remain silent and wait until much later and then decide to sue. *Wood v. Gunther,* 89 Cal. App. 2d 718, 201 P.2d 874; *Meherin v. Meherin,* 93 Cal. App. 2d 459, 209 P.2d 36; *Pacific Atlantic Wine, Inc. v. Duccini,* 111 Cal. App. 2d 957, 245 P.2d 622.

The record amply supports the finding of the Court that the plaintiff acquiesced in his exclusion. For example, the plaintiff did not file suit in this matter until September, 1954, over eighteen months after he had

been excluded from the business (Record 14805, page 15). There is nothing in the record to indicate that any time Joseph Siciliano or his employees ever objected to Mr. Norman Thompson taking over management of the business. To the contrary, the key employee of the plaintiff Siciliano, Ernesto Diza, testified that, pursuant to Mr. Thompson's instructions, he turned over everything to Mr. Norman Thompson (Record 14805, page 297). Plaintiff's counsel in the Lower Court admitted this as follows:

> "As to those facts I cannot disagree, as to the fact of effective control in July of 1953; I cannot disagree as to the fact no action was brought or demands made pertinent to this matter until the date this action was commenced. I cannot disagree." (R. 14805, page 461).

IV.

A Partnership Is Not Required to be Dissolved By Court Order Under the Uniform Partnership Act, and It Was Not Error for the Court to Establish a Date Other Than the Date of the Final Court Order As the Date or Dissolution of the Partnership.

The Court at no time ever indicated that it was considering a date of final termination pursuant to dissolution other than July 1, 1953. In the court's opinion, written prior to the final judgment, the court stated as follows:

> "The court, therefore, is of the view that the parties dissolved the partnership as between themselves on July 1, 1953, and that the plaintiff's interest should be determined as of that date without reference to the value of good will of the business." (R. 14805, page 108).

The Court in its final judgment fixed July 1, 1953, as the date of dissolution (R. 14805, page 113).

In the Lower Court counsel for the plaintiff (who are representing the plaintiff on appeal) admitted that the facts of the defendant's termination were undisputed and that it was purely a question of law whether the partnership could be dissolved by the parties without court intervention. Plaintiff's counsel informed the Lower Court he would not disagree that the plaintiff had been completely excluded by the defendant and had not complained or demanded satisfaction prior to bringing this action. Then plaintiff's counsel admitted this case involved strictly a point of law:

> "It is a question of law which I am propounding which I believe to be sound. There has been some confusion in the cases, that I concede, as to when dissolution of one of these agreements actually takes place. I believe the better view is that there can be no dissolution until ordered by a court of competent jurisdiction * * * (R. 14805, page 461)."

The plaintiff Siciliano, in his opening brief, page 24-25, takes the position that a partnership for a fixed term is not disolved by the expressed will of one partner alone. As pointed out in the appellant American Pacific Dairy Products, Inc.'s opening brief, the appellant takes the position that this is not an agreement for a definite term, but rather an informal agreement established by the court to prevent injustice. Even if it were for a fixed term, however, as a matter of law a trial court is not bound to fix a date of dissolution in a contract for a fixed term as of the date of the court's final order. In the case of *Zeibak v. Nasser, supra,* the

California Supreme Court did not state that the only time a court could decree a dissolution was at the conclusion of the court's finding or final judgment. In the *Zeibak* case, *supra,* the California Supreme Court used the time of the entry of the court's finding and not the time of final judgment, and would have used the date of the plaintiff's improper acts as the date of dissolution but was prevented from doing so by an examination of all the lower court's finding of facts which established that dissolution did not occur at the earlier date. The California Supreme Court stated as follows:

> "Although the words in this finding 'and by reason of the conduct of the plaintiff on or about December 11, 1932, as hereinbefore found, by virtue of which said conduct the said plaintiff caused a wrongful disolution of the venture,' considered separately might be said to support defendants' contention [that dissolution should have been decreed as of December 11, 1932], nevertheless, under rules relating to the interpretation of findings, certain language may not be isolated from the entire context, where to do so would place an interpretation upon such finding different from that which would follow from reading of the finding as a whole." [ ] added. (12 Cal.2d. 1, 8)

This shows very clearly that the court was willing to consider the date of breach as being a proper date of dissolution.

This position is well set forth in the recent case of *Vangel v. Vangel,* 116 Cal.App.2d 615, 254 P.2d 919 (1953) which cites the *Zeibak* case and then holds it is proper for the trial court to fix a date of dissolu-

tion 16 months prior to the final judgment. In the *Vangel* case at points [5] and [6] the Court stated:

> "It is, of course, clear that a Court may, because of a breach of the partnership agreement, decree the dissolution of a partnership as of a date prior to judgment. In some cases where the breach is serious and unequivocal the dissolution may be decreed as of the date of the breach. In such cases the misconduct really dissolves the partnership, the Court decree merely giving legal effect thereto. But here the acts of Charles in including excluding leave a blank did not *ipso facto* dissolve the partnership. His acts simply provided grounds for an application to a court of equity for such relief * * * ."

As pointed out in appellant American Pacific Dairy Prod., Inc.'s appellant brief, a dissolution need not be solely by court order by virtue of a cause listed in Guam Civil Code Section 2425, but can be caused by a change of relationship between the parties. This is set forth in Guam Civil Code Section 2423, as follows:

> "The dissolution of a partnership is the change in relationship of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."

For an interpretation directly upholding Section 15029 Civil Code of California, which is identical to the above-cited section, and stating that dissolution takes place when any partner ceases to be associated in the carrying on of the business as distinguished from the winding up of the business, see *Meherin v. Meherin, supra,* and *Fooshe v. Sunshine,* 96 Cal. App.2d

336, 215 P.2d 66. See also the cases cited in appellant American Pacific Dairy Products, Inc.'s, brief, pages 47-48.

Certainly the dissolution of a partnership caused by the breach of an agreement occurred at the date of the breach or abandonment by Siciliano.

V.

An Acounting Was Not Necessary for the Period Following the Dissolution and Termination of the Partnership.

The plaintiff admits in his opening brief (Pl. Br. p. 28) that the Lower Court established an accounting as of July 1, 1953, and did not order an accounting subsequent to that date. This was perfectly proper, since the dissolution had already occurred, and the Court was establishing the liquidation. The plaintiff again relies on his previous position that the date of dissolution must be the date of the Lower Court's entry of judgment rather than the date that the dissolution actually takes place, and this has previously been pointed out to be an incorrect rule. In the present case, defendant American Pacific Dairy Products, Inc. submits that the business was dissolved on July 1, 1952, and that if there was a partnership it was a *de facto* partnership which defendant American Pacific Dairy Products, Inc., as the innocent party, had the right to dissolve and then wind up under Guam Civil Code, Section 2431, which states as follows:

> "Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the

> legal representative of the last surviving partner, not bankrupt, have the right to wind up the partnership affairs: Provided, however, that any partner, his legal representative, or his assignee, upon cause shown may obtain winding up by the Court."

There is no requirement that the injured party in a partnership or joint venture must go to a Court of Equity for dissolution, but they may instead exercise self help as is shown by Guam Civil Code, Section 2431, and the cases cited in defendant American Pacific Dairy Products, Inc.'s brief on page 47. The defendant American Pacific Dairy Products, Inc., did not give notice under the partnership agreement, since no partnership agreement was ever ratified by appellant, and to have given notice under its terms would have been to recognize or impliedly ratify the partnership agreement of the actions of plaintiff Siciliano in deserting the venture.

The plaintiff Siciliano confuses the defendant American Pacific Dairy Products, Inc.'s offer to return to the plaintiff his full capital investment without a deduction for damages, and the taking over of the business in April, 1953, which was an accounting and winding up of the business with the dissolution which took place July 1, 1952.

The plaintiff Siciliano, by his silence for a period of nearly two years from the date of final exclusion and the offer of appellant American Pacific Dairy Products, Inc., of the accounting must be deemed to have acquiesced and accepted such offer. As pointed out previously, plaintiff counsel admits these facts to

be true (R. 14805, 461). This was an offer and acceptance of an accounting in final dissolution and winding up of the partnership and not an acquiescence by the plaintiff Siciliano in the dissolution, since he had already caused the dissolution by his breach. *Wood v. Gunther,* 89 Cal.App.2d 718, 201 P.2d 874.

The plaintiff cites the case of *Rishwain v. Smith,* 77 Cal.App.2d 524, 534, 175 P.2d 55, and *Swarthout v. Gentry* (1934) 62 Cal.App.2d 68, 78, 144 P.2d 38, for the position that *all* of the transactions of American Pacific Dairy Products, Inc., even *after* the date of July 1, 1953, should be made part of an accounting. The above cited cases do not stand for the proposition that assets can be traced after a dissolution and accounting has taken place. The case of *Rishwain v. Smith, supra,* was to determine whether certain property which had been transferred by partnership signature was community property or partnership property. The Court properly held that property which had been placed in the partnership and treated as partnership property should be considered as partnership property, and the partners couldn't avoid transferring the land by a technical legal defense that their wives had not signed the transfer papers. In the case at bar the plaintiff was offered payment for his interest in the partnership in good faith by the partner winding up and must be held to have acquiesced in this offer by not taking action with regard to it.

In addition, there is no evidence in the record to support a finding that any of the funds of plaintiff Siciliano were ever diverted from the joint venture,

and certainly defendant American Pacific Dairy Products, Inc., was justified in using its own funds to expand its business which had been lagging due to defendant Siciliano's refusing answer the letters of appellant American Pacific Dairy Products, Inc., or clarifying the situation so that the plaintiff could go ahead with its program of expansion as originally planned prior to Mr. Siciliano's entry on the scene. Even if defendant's position of an earlier dissolution is not accepted the Lower Courts dissolution and termination date of July 1, 1953, must stand.

VI.

The Lower Court Properly Exercised Its Discretion in Refusing to Appoint a Receiver and Cause a Judicial Sale of the Assets.

The plaintiff cites no authority for his statement that "as a general rule the Courts after an accounting should require the partnership property to be sold. The net proceeds of such sale are then divided among the partners" (Pl. Br. page 31). This is certainly not the general situation which occurs at the demise of a partnership, and the Uniform Partnership Act specifically provides for one partner winding up the business without court intervention. Guam Civil Code, Section 2431. In the ordinary situation one partner does wind up the business and often will continue the business as a sole proprietor, having paid the other partner his share of the business. In this connection, see the cases of *Speka v. Speka,* 124 Cal.App.2d 181, 268 P.2d 129; *Wood v. Gunther, supra; Griffeth v. Fehsel,* 61 Cal.App.2d 600, 607, 143 P.2d 522.

The plaintiff cites the case of *Breedlove v. Breedlove Excavating Co.* (1942) 56 Cal.App. 2d 141, 132 P.2d 239, for the proposition that he is entitled to the appointment of a receiver and a complete accounting of all affairs of the partnership. This case does not hold that a receiver ordinarily should be appointed. In fact, it states exactly the opposite propostion, as follows:

> "It is true that the power conferred upon a Court to appoint a receiver is a delicate one, and must be exercised with caution lest injury be done to the parties and their properties *(Dabney Oil Co. v. Providence Oil Co.,* 22 Cal. App. 233, 135 P. 1155) and the remedy is to be regarded as an extraordinary or harsh one, to be resorted to only in cases where other less onerous remedies are not available (*De Leones v. Walsh,* 148 Cal. 254, 82 Pac. 1047); yet the question is one which is commonly addressed to the sound discretion of the Court, exercised upon all the facts *(Cal. Delta Farms, Inc. v. Chinese American Farms,* 204 Cal. 524, 269 P. 443), and where a finding passed upon conflicting evidence is to the effect that danger is threatened to property or funds, and the appointment of a receiver is made, it is seldom that the reviewing court will hold that the lower tribunal has been guilty of an abuse of the discretion confided to it. *Whitley v. Bradley,* 13 Cal. App. 720, 110 Pac. 596. Indeed, so broad is the discretion of the chancellor to whom the petition is first addressed *(Davies v. Ramsdell,* 40 Cal. App. 432, 183 Pac. 702) that such exercise will be interfered with by an appellate tribunal only in those cases where there has been an arbitrary exercise of the power. *Fox v. Flood,* 44 Cal. App. 876, 187 Pac. 68."

Even if defendant American Pacific Dairy Products, Inc.'s offer of settlement was not considered a binding offer for an accounting which was accepted by the silence of plaintiff Siciliano, the Court was justified in decreeing an accounting on the basis of the evidence before it without the appointment of a receiver or a sale of the assets of the partnership.

The Court properly attempted to grant the plaintiff Siciliano his rights (under Guam Civil Code, Section 2432(c)), based on plaintiff having wrongfully caused the dissolution. This section provides that the partner who has caused the dissolution wrongfully shall have the right to have the value of his interest in the partnership less any damage caused to his co-partners ascertained and paid to him in cash, and to be released from existing liabilities of the partnership, but in ascertaining the value of a partner's interest, the value of good will in the business shall not be considered. The plaintiff in this case was decreed to have a right in cash to the value of his interest in the business, less any value for good will. Certainly there was nothing else in the business other than the plaintiff's original capital investment plus profits to the date of termination. The defendant American Pacific Dairy Products, Inc., has argued that the Lower Court confused the date of dissolution with the date of final termination of the partnership, but certainly the Court was justified, whichever date is proper, in paying to the plaintiff the value of his interest in the partnership as of the date established by the Lower Court without requiring the business to be sold.

VII.

The Court Should Have Awarded Plaintiff Only the Return of His Original Investment Plus a Share of Profits to the Date of Liquidation.

The plaintiff urges that he should have received a share of the profits subsequent to July 1, 1953, and a share of tangible assets of the business (Pl. Br. 32-39).

It is undisputed that the plaintiff did nothing more than invest $15,000 into the partnership in return for a 50% interest. The plaintiff put in no evidence to indicate that there was any value in the business due to an appreciation of real property, and under Guam Civil Code, Section 2432, the plaintiff is not entitled to any amount for good will, since he is the party that wrongfully caused the dissolution. In the case at bar, it is undisputed that the plaintiff Siciliano received as part of the judgment not only his original investment of $15,000, but also one-half of the profits to the date of final termination, plus one-half of the value of any improvements which are said to belong to the business (Record 14805, page 112). The cases of *Zeibak v. Nasser, supra,* and *Gardner v. Shreve* (1949) 89 Cal.App.2d 804, 202 P.2d 322, cited by the plaintiff on page 34 of his brief, merely state that the party at fault in a dissolution does not necessarily forfeit all his rights by causing a dissolution. In the case at bar the defendant American Pacific Dairy Products, Inc. has never tried to declare forfeited all the rights of the plaintiff Siciliano. The appellant American Pacific Dairy Products, Inc. tendered to Mr. Siciliano his

full original investment of $15,000, which was his interest in the partnership as of July 1, 1952, when he caused the dissolution. At that time there had been no profits earned as shown by the books and therefore no profits were offered. From that time forward defendant appellant American Pacific Dairy Products, Inc., has been billed for the salaries of all parties and for all materials and has paid such bills.

Defendant American Pacific Dairy Products, Inc., agrees with the plaintiff Siciliano that he is entitled only to his *pro rata* share of all profits between the date of dissolution and the date of termination (Pl. Br. 35). Plaintiff again makes the mistake of confusing the dates of *dissolution* (July 1, 1952), *with* the *date of final termination* and winding up of the partnership (April 21, 1953) with the date of Court decreed recognition of the dissolution (July 1, 1953). Defendant American Pacific Dairy Products, Inc., and the plaintiff Siciliano both cite the case of *Moseley v. Moseley* (C.A. 9, 1952) 196 F.2d 663, and allied cases for the proposition that the plaintiff is only entitled to his *pro rata* share between the date of dissolution and the final winding up of the partnership. As pointed out in appellant American Pacific Dairy Products, Inc.'s brief, pages 50-54, the plaintiff Siciliano should have been entitled to only 26 per cent of the profits from the period after the date of dissolution of the partnership, which was July 1, 1952, until the offer for final termination and settlement of April 21, 1953. Even if the Court's date of dissolution of July 1, 1953, should be accepted, the plaintiff would only be entitled

to 26 per cent of the profits to July 1, 1953, or 26 per cent of $33,753.49 (Record 14805, pages 110-111). This would mean only a total amount of profits granted to plaintiff of $8,775.90, whereas the Court granted the plaintiff $16,876.75 as profits for this period (R. 14805 p. 112).

The plaintiff Siciliano and defendant American Pacific Dairy Products, Inc., seem to be agreed that plaintiff Siciliano is only entitled to the *pro rata* share of his profits rather than a 50 per cent interest, which he was granted by the Court.

The argument between plaintiff Siciliano and defendant American Pacific Dairy Products, Inc., is as to the date of dissolution and the date of final winding up or termination of the partnership. Plaintiff Siciliano, having invested only $15,000 compared to defendant American Pacific Dairy Products, Inc., investing $42,500, it would seem apparent that whatever date of termination is used, plaintiff Siciliano is only entitled to 26 per cent of the profits to that date.

VIII.

The Lower Court Did Not Err in Failing to Grant Plaintiff Good Will.

The plaintiff Siciliano argues that he was entitled to a payment for good will (Pl. Br. 39).

As previously pointed out, the party who has caused the wronful dissolution of the partnership is not entitled to any payment for good will. Guam Civil Code, Section 2432(c). The plaintiff Siciliano argues, on pages 39-41 of his brief, that the plaintiff Siciliano

was the innocent party to the dissolution. This is squarely against the findings of the lower court which are amply supported by the record as pointed out in Section I of this brief.

CONCLUSION

Cross-appellee-defendant American Pacific Dairy Products, Inc., was forced to take over completely the operation of the business which it had hoped to place under the management of Joseph Siciliano on the Island of Guam because said Siciliano did not manage the business as he had offered to do. The defendant's chief problems have been caused by its attempts to lean over backwards to protect Siciliano. *At most,* defendant cross-appellee American Pacific Dairy Products, Inc., should only be required to repay the original investment of plaintiff Siciliano in the amount of $15,000, plus a *pro rata* share of the profits of Siciliano from the date of dissolution of July 1, 1952, until the date of final winding up of the partnership, which defendant American Pacific Dairy Products, Inc., maintains is April 23, 1953, and which was found by the Court to be July 1, 1953.

Respectfully submitted,

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